Martin Bencher (M) Sdn Bhd v Sapura Energy Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1879–11 OF 2023
SEE MEE CHUN, MOHD NAZLAN AND FAIZAH JAMALUDIN JJCA
6 FEBRUARY 2025

Companies and Corporations — Arrangement, scheme of — Restraint of proceedings — Respondents owed debts to appellant — Respondents formulated scheme of arrangement with creditors — Respondents and appellant entered into settlement agreement — Respondents applied for and obtained first restraining orders pursuant to ss 366 and 368 of Companies Act 2016 — Respondents applied for and obtained second restraining orders when first restraining orders expired — Appellant applied to set aside restraining orders — Appellant applied to be excluded from scheme of arrangement — Whether second application and restraining orders valid and regular or whether they constituted abuse of process — Whether by reason of settlement agreement, debt owed by respondents to appellant fell outside cut-off date for filing of proof of debt — Companies Act 2016 ss 366 & 368

Statutory Interpretation — Construction of statutes — Purposive approach — Interpretation of ss 366 and 368 of Companies Act 2016 — Whether ss 366 and 368 of Companies Act 2016 ought to be interpreted liberally and by adopting purposive approach — Interpretation Acts 1948 and 1967 s 17A

The appellant and the respondents/the three Sapura entities together with 20 subsidiaries of the first respondent ('the group companies') entered into a settlement agreement ('the settlement agreement') on 23 February 2022. The settlement agreement came about from the consolidation of the debts owed to the appellant by the respondents, for which two separate suits ('the two suits') had been instituted on 7 October 2021 and 7 December 2021. Due to the financial difficulties faced by the respondents, they had formulated a scheme of arrangement with their creditors to restructure their financial affairs and liabilities. The respondents had obtained ex parte order in OS 148 pursuant to ss 366 and 368 of the Companies Act 2016 ('the CA 2016') to convene creditors' meeting within 12 months and to restrain any actions against the group companies for three months ('the OS 148 convening and restraining orders'). This restraining order was subsequently extended by nine months. When OS 148 convening and restraining orders expired, the respondents filed OS 121 and subsequently obtained fresh ex parte orders to convene creditors' meeting within three months and restraining actions for three months ('the OS 121 convening and restraining orders'). These orders were then extended by

nine months and on the expiry of these orders, the respondents applied for yet similar orders. By consent of the parties, the appellant was allowed to intervene in OS 121. The appellant then filed encl 139 to seek for the following reliefs: (a) to set aside OS 121 convening and restraining orders and any further orders; and (b) for the appellant to be excluded from any proposed arrangement and compromise between the respondents and their respective creditors. The appellant contended that: (i) there was multiplicity of proceedings and abuse of process in light of the two ongoing originating summonses, the OS 121 and OS 148, simultaneously; and (ii) the appellant should not have been included in the proposed scheme in the first place given the criteria set by the respondents, especially on the 31 January 2022 cut-off date for debts when the settlement agreement came into existence subsequently on 23 February 2022. The respondents on the other hand contended that the OS 148 convening and restraining orders had expired on 10 March 2023 and were thus superseded by the OS 121 convening and restraining orders which became effective on 11 March 2023. There was therefore no duplicity or abuse of process as there were no simultaneous live proceedings. The High Court dismissed the appellant's prayers in encl 139, hence, the present appeal. The issues to be determined by the court in the present appeal were: (A) whether the second application under OS 121 and the orders granted pursuant thereto were valid and regular or whether they constituted an abuse of process; and (B) whether by reason of the settlement agreement, the debt owed by the respondents to the appellant fell outside the cut-off date for the filing of proof of debt ('the POD').

Held, affirming the High Court's order and dismissing the appeal with cost to the respondents:

(1) Based on the words of s 366 of the CA 2016, there was no restriction which prevented the court from granting a fresh convening order after the earlier one had ceased to have effect after the expiry of the time limit of 12 months imposed by the court when granting leave. The court emphasised that OS 121 convening and restraining orders was not an extension of the OS 148 convening and restraining orders but in fact and law a fresh set of orders altogether. Further, based on the facts, OS 148 and OS 121 never co-existed at any point in time. There was no duplicity in the present case. It was inaccurate to say that OS 148 was left unresolved and that OS 148 should have been formally withdrawn, because OS 148 had in fact already expired and ceased to have any legal effect (see paras 37–38 & 40).

(2) Under s 368(2) of the CA 2016, the court was empowered to grant a restraining order for a period not exceeding three months and an extension thereto for a maximum period of nine months, only if the four requirements set out therein were fulfilled. In the present case, the court must have determined that for both OS 148 and OS 121, the applications for the restraining orders and their respective extensions had

satisfied these four requirements. No issue was raised by the appellant here. All these militated against the finding of any abuse of process on the part of the group companies, and the respondents in particular (see paras 44–47).

(3) Section 368 of the CA 2016 did not empower the court to grant a further extension after the extension of nine months had been granted under s 368(2) of the CA 2016. Further, the present law as reflected in the recent amendments to the CA 2016 was even clearer in stating that the maximum life of a restraining order was three months plus nine months. Therefore, the group companies were correct in taking the view that the restraining order in the OS 148 convening and restraining orders could not be further extended after the 12-month period to provide the protection to the efforts in pursuit of their proposed scheme, which therefore necessitated the filing of the OS 121, which in turn resulted in the OS 121 convening and restraining orders (see paras 48, 50 & 54).

(4) Sections 366 and 368 of the CA 2016 ought to be interpreted liberally to give effect to the objective of saving companies and preventing an objecting minority from frustrating the scheme. Adopting a purposive approach, which was also mandated by s 17A of the Interpretation Acts 1948 and 1967, the court had no hesitation in stating that given the overarching intent of the Legislature, which in this context leant towards ensuring the survival of financially distressed company whilst also safeguarding creditors' interests, restricting applications beyond the 12-month period prescribed in s 368(2) in force then would contradict the intent of the Legislature. Therefore, the court agreed with the learned High Court judge that the fresh application by the applicants under OS 121 adhered to the spirit of the legislation, which was aimed at providing companies with an opportunity to revive and restructure in the face of financial distress (see paras 87 & 98).

(5) The two suits were filed on 7 October 2021 and 7 December 2021 respectively. The settlement agreement was dated 23 February 2022 whilst the cut-off date for submission of a POD for the proposed scheme was 31 January 2022. The settlement agreement which was executed subsequent to the cut-off date could not therefore have been considered. The respondents did not recognise the settlement agreement. But they had examined the PODs filed by the appellant on the basis of the debts already subsisting and owing to the appellants prior to the same being made subject to the arrangement set out in the settlement agreement (see paras 109–110).

(6) By filing its PODs as debts that had arisen prior to the cut-off date of 31 January 2022, the appellant had unmistakably voluntarily elected to make the submission of the POD, and established itself as a scheme creditor. This resulted in the appellant submitting to a legal relationship

between itself as creditor and the respective scheme company agreeing for the debts to be determined under the proposed scheme. It could not be emphasised enough that it was the appellant's own conduct that had submitted its PODs on 18 May 2022. This amounted to a submission to the scheme process supervised by the court (see paras 116–117).

(7) The law took cognisance of the fact that once there was a voluntary submission to jurisdiction by the filing of a proof of debt in one proceeding in a proposed scheme of arrangement, such submission would continue and survive in any immediately succeeding proceedings, because these proceedings were part of a single and continuous restructuring effort. In the present case, the voluntary submission of the PODs by the appellant in the first scheme proceedings did not only tantamount to a submission to the jurisdiction of the OS 148, but also a submission to the jurisdiction concerning the second proceedings (the OS 121) which became effective immediately upon expiry of OS 148 convening and restraining orders, and then the continued submission to the jurisdiction vis a vis the third proceedings which in turn had taken effect on 11 March 2024 immediately on the expiry of the second proceedings (see paras 129–130).

(8) **Obiter dictum**: The court emphasised that the recent amendments to the CA 2016 only came into force in April 2024 and did not apply to the facts examined in the present appeal. However, had the new law been applicable, the court opined that there would have been no infringement of s 368(3B) of the CA 2016. Section 368(3B) provided for a clear period or a cooling off period of 12 months before the next restraining order could be granted. In the present case, even though the court granted a restraining order under OS 121 immediately on the expiry of the earlier restraining order under OS 148 as extended by nine months, by the time the order under OS 121 was granted, 12 months had only just lapsed from the date of the granting of a restraining order under OS 148 convening and restraining orders. If this was permitted under the new law, neither could it be alleged to have been an abuse of process (see paras 55–56 & 59–69).

[Bahasa Malaysia summary

Perayu dan responden-responden/tiga entiti Sapura bersama-sama dengan 20 anak syarikat responden pertama ('kumpulan syarikat-syarikat tersebut') telah menandatangani satu perjanjian penyelesaian ('perjanjian penyelesaian tersebut') pada 23 Februari 2022. Perjanjian penyelesaian tersebut terhasil daripada penyatuan hutang yang terhutang kepada perayu oleh responden-responden, yang mana dua saman berasingan ('kedua-dua saman tersebut') telah difailkan pada 7 Oktober 2021 dan 7 Disember 2021. Disebabkan oleh masalah kewangan yang dihadapi oleh responden-responden, mereka telah merangka satu skim perkiraan dengan pemiutang-pemiutang

mereka untuk menstruktur semula hal ehwal kewangan dan liabiliti mereka. Responden-responden telah memperoleh perintah ex parte dalam SP 148 menurut ss 366 dan 368 Akta Syarikat 2016 ('AS 2016') untuk mengadakan mesyuarat pemiutang-pemiutang dalam tempoh 12 bulan dan untuk menghalang apa-apa tindakan terhadap kumpulan syarikat-syarikat tersebut selama tiga bulan ('perintah pengadaan dan penghalangan SP 148'). Perintah penghalangan ini kemudiannya dilanjutkan selama sembilan bulan. Apabila perintah pengadaan dan penghalangan SP 148 tamat tempoh, responden-responden memfailkan SP 121 dan kemudiannya memperoleh perintah ex parte baharu untuk mengadakan mesyuarat pemiutang-pemiutang dalam tempoh tiga bulan dan untuk menghalang tindakan selama tiga bulan ('perintah pengadaan dan penghalangan SP 121'). Perintah ini kemudiannya dilanjutkan selama sembilan bulan dan apabila perintah ini tamat tempoh, responden-responden memohon lagi untuk perintah yang serupa. Dengan persetujuan pihak-pihak, perayu dibenarkan untuk campur tangan dalam SP 121. Perayu kemudiannya memfailkan lampiran 139 untuk mendapatkan relif-relif berikut: (a) untuk mengenepikan perintah pengadaan dan penghalangan SP 121 dan apa-apa perintah selanjutnya; dan (b) agar perayu dikecualikan daripada apa-apa perkiraan dan kompromi yang dicadangkan antara responden-responden dan pemiutang-pemiutang masing-masing. Perayu berhujah bahawa: (i) terdapat kepelbagaian prosiding dan penyalahgunaan proses disebabkan oleh dua saman pemula yang sedang berjalan, SP 121 dan SP 148, secara serentak; dan (ii) perayu tidak sepatutnya dimasukkan ke dalam skim perkiraan yang dicadangkan tersebut disebabkan oleh kriteria yang ditetapkan oleh responden-responden, terutamanya berkenaan tarikh penggalan hutang pada 31 Januari 2022 sedangkan perjanjian penyelesaian tersebut dimasuki kemudiannya pada 23 Februari 2022. Responden-responden sebaliknya berpendapat bahawa perintah pengadaan dan penghalangan SP 148 telah tamat tempoh pada 10 Mac 2020 dan sekali gus digantikan oleh perintah pengadaan dan penghalangan SP 121 yang berkuat kuasa pada 11 Mac 2023. Oleh itu, tiada perduaan atau penyalahgunaan proses kerana tiada prosiding-prosiding langsung yang berjalan serentak. Mahkamah Tinggi menolak permohonan perayu dalam lampiran 139, justeru, rayuan semasa. Isu-isu yang perlu diputuskan oleh mahkamah dalam rayuan semasa ialah: (A) sama ada permohonan kedua di bawah SP 121 dan perintah yang diberikan menurutnya adalah sah dan teratur atau sama ada ia merupakan penyalahgunaan proses; dan (B) sama ada disebabkan oleh perjanjian penyelesaian tersebut, hutang yang terhutang oleh responden-responden kepada perayu jatuh di luar tarikh penggalan untuk pemfailan bukti hutang ('PBH').

Diputuskan, mengesahkan perintah Mahkamah Tinggi dan menolak rayuan dengan kos diberikan kepada responden-responden:

(1) Berdasarkan ayat dalam s 366 AS 2016, tiada sekatan yang menghalang

A mahkamah daripada memberikan perintah pengadaan baharu selepas perintah yang lebih awal tidak lagi berkuat kuasa selepas tamat tempoh 12 bulan yang dikenakan oleh mahkamah semasa memberikan kebenaran. Mahkamah menegaskan bahawa perintah pengadaan dan penghalangan SP 121 bukanlah lanjutan daripada perintah pengadaan B dan penghalangan SP 148 tetapi pada hakikat dan undang-undangnya merupakan satu set perintah yang baharu sama sekali. Selanjutnya, berdasarkan fakta, SP 148 dan SP 121 tidak pernah berlangsung bersama pada bila-bila masa. Tiada penduaan dalam kes semasa. Adalah tidak C tepat untuk mengatakan bahawa SP 148 dibiarkan tidak diselesaikan dan SP 148 sepatutnya telah ditarik balik secara rasmi, kerana SP 148 sebenarnya telah tamat tempoh dan tidak lagi mempunyai apa-apa kesan undang-undang (lihat perenggan 37–38 & 40).

(2) Di bawah s 368(2) AS 2016, mahkamah diberi kuasa untuk memberikan D perintah penghalangan untuk tempoh tidak melebihi tiga bulan dan lanjutan untuk tempoh maksimum sembilan bulan, hanya jika empat keperluan yang ditetapkan di dalamnya dipenuhi. Dalam kes semasa, mahkamah tentunya telah memutuskan bahawa untuk kedua-dua SP 148 dan SP 121, permohonan untuk perintah penghalangan dan E lanjutan masing-masing telah memenuhi empat keperluan ini. Tiada persoalan dibangkitkan oleh perayu berkenaan dengan perkara ini. Semua ini menentang dapatan tentang apa-apa penyalahgunaan proses di pihak kumpulan syarikat-syarikat tersebut, dan responden-responden khususnya (lihat perenggan 44–47).

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(3) Seksyen 368 AS 2016 tidak memberi kuasa kepada mahkamah untuk memberikan lanjutan lanjut selepas lanjutan sembilan bulan telah diberikan di bawah s 368(2) AS 2016. Tambahan pula, undang-undang semasa seperti yang ditunjukkan dalam pindaan kepada AS 2016 G baru-baru ini adalah lebih jelas dengan menyatakan bahawa jangka hayat maksimum suatu perintah penghalangan adalah selama tiga bulan ditambah sembilan bulan. Oleh itu, kumpulan syarikat-syarikat tersebut adalah betul dalam mengambil pandangan bahawa perintah penghalangan dalam perintah pengadaan dan penghalangan SP 148 H tidak boleh dilanjutkan lagi selepas tempoh 12 bulan untuk memberikan perlindungan kepada usaha bagi merealisasikan skim yang dicadangkan mereka, yang oleh itu memerlukan pemfailan SP 121, yang seterusnya menghasilkan perintah pengadaan dan penghalangan SP 121 (lihat perenggan 48, 50 & 54).

I (4) Seksyen 366 dan 368 AS 2016 sepatutnya ditafsirkan secara liberal untuk memberi kesan kepada objektif menyelamatkan syarikat dan menghalang minoriti yang membantah daripada mengecewakan skim tersebut. Mengguna pakai pendekatan bertujuan, yang juga telah dimandatkan oleh s 17A Akta Tafsiran 1948 dan 1967, mahkamah tidak

teragak-agak dalam menyatakan bahawa memandangkan niat menyeluruh badan perundangan, yang dalam konteks ini bersandar pada memastikan kelangsungan syarikat yang mengalami masalah kewangan di samping melindungi kepentingan pemiutang-pemiutang, pembatasan permohonan-permohonan melebihi tempoh 12 bulan yang ditetapkan dalam s 368(2) yang berkuat kuasa pada masa tersebut akan bercanggah dengan niat badan perundangan. Oleh itu, mahkamah bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa permohonan baharu oleh pemohon-pemohon di bawah SP 121 mematuhi semangat perundangan, yang bertujuan memberi peluang kepada syarikat untuk memulihkan dan menyusun semula dalam menghadapi masalah kewangan (lihat perenggan 87 & 98).

(5) Kedua-dua saman tersebut difailkan masing-masing pada 7 Oktober 2021 dan 7 Disember 2021. Perjanjian penyelesaian tersebut bertarikh 23 Februari 2022 manakala tarikh penggalan untuk penyerahan PBH bagi skim yang dicadangkan ialah 31 Januari 2022. Perjanjian penyelesaian tersebut yang telah ditandatangani selepas tarikh penggalan tersebut tidak boleh dipertimbangkan. Responden-responden tidak mengiktiraf perjanjian penyelesaian tersebut. Tetapi mereka telah meneliti PBH yang difailkan oleh perayu berdasarkan hutang yang telah wujud dan terhutang kepada perayu sebelum hutang tersebut tertakluk kepada perkiraan yang dinyatakan dalam perjanjian penyelesaian tersebut (lihat perenggan 109–110).

(6) Dengan memfailkan PBHnya sebagai hutang yang berbangkit sebelum tarikh penggalan pada 31 Januari 2022, adalah tidak dapat disangkal bahawa perayu telah secara sukarela memilih untuk membuat penyerahan PBH tersebut, dan menetapkan dirinya sebagai pemiutang skim. Kesannya, perayu telah menyerah kepada hubungan undang-undang antara dirinya sebagai pemiutang dan syarikat skim yang berkenaan dan bersetuju supaya hutang ditentukan di bawah skim yang dicadangkan. Tidak dapat ditekankan dengan secukupnya bahawa ia adalah kelakuan perayu sendiri yang telah menyerahkan PBHnya pada 18 Mei 2022. Ini merupakan penyerahan kepada proses skim yang diawasi oleh mahkamah (lihat perenggan 116–117).

(7) Undang-undang mengambil kognisans tentang hakikat bahawa apabila terdapat penyerahan sukarela kepada bidang kuasa dengan memfailkan bukti hutang dalam satu prosiding dalam skim perkiraan yang dicadangkan, penyerahan tersebut akan diteruskan dan kekal dalam mana-mana prosiding yang berikutnya, kerana prosiding ini adalah sebahagian daripada usaha penyusunan semula tunggal dan berterusan. Dalam kes semasa, penyerahan PBH secara sukarela oleh perayu dalam prosiding skim pertama bukan sahaja sama dengan penyerahan kepada bidang kuasa SP 148, tetapi juga penyerahan kepada bidang kuasa

berkenaan prosiding kedua (SP 121) yang berkuat kuasa serta-merta selepas perintah pengadaan dan penghalangan SP 148 tamat tempoh, dan seterusnya penyerahan yang berterusan kepada bidangkuasa vis a vis prosiding ketiga yang kemudiannya berkuat kuasa pada 11 Mac 2024 serta-merta selepas prosiding kedua tamat tempoh (lihat perenggan 129–130).

(8) **Obiter dictum**: Mahkamah menegaskan bahawa pindaan kepada AS 2016 baru-baru ini hanya berkuat kuasa pada April 2024 dan tidak terpakai kepada fakta yang dipertimbangkan dalam rayuan semasa. Bagaimanapun, sekiranya undang-undang baharu tersebut terpakai, mahkamah berpendapat bahawa tidak akan ada pelanggaran s 368(3B) AS 2016. Seksyen 368(3B) memperuntukkan tempoh yang jelas atau tempoh bertenang selama 12 bulan sebelum perintah penghalangan seterusnya boleh diberikan. Dalam kes semasa, walaupun mahkamah memberikan perintah penghalangan di bawah SP 121 serta-merta selepas tamat tempoh perintah penghalangan terdahulu di bawah SP 148 yang dilanjutkan selama sembilan bulan, pada masa perintah di bawah SP 121 diberikan, 12 bulan baru sahaja luput dari tarikh pemberian perintah penghalangan di bawah perintah pengadaan dan penghalangan SP 148. Jika ini dibenarkan di bawah undang-undang baharu, ia juga tidak boleh dikatakan sebagai penyalahgunaan proses (lihat perenggan 55–56 & 59–69).]

Cases referred to

Century Services Inc v Canada (Attorney General) [2010] 3 SCR 379, SC (refd)
Century Sun International Ltd, Re [2022] HKCU 1890 (refd)
Dynawell Corporation (M) Sdn Bhd (in provisional liquidation) v Universal Trustee (M) Berhad [2013] 1 LNS 1391, HC (distd)
Harris (in their capacity as joint and several liquidatrs of Samgris Resources Pty Ltd) (In Liq) v Samgris Resources Pty Ltd (In Liq) [2022] QSC 126, SC (refd)
Hawkair Aviation Services Ltd, Re [2006] BCJ No 938, SC (refd)
Intrakota Komposit Sdn Bhd v Sogolease Advance (Malaysia) Sdn Bhd [2004] MLJU 588; [2004] 8 CLJ 276, HC (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637; [1999] 4 CLJ 533, CA (refd)
Lai Kim Loi v Dato' Lai Fook Kim & Anor [1989] 2 MLJ 290, SC (refd)
Lehman Brothers Australia Ltd (No 2) [2013] FCA 965, FC (refd)
Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal [2019] SGCA 29, CA (refd)
PECD Berhad & Anor (Part 2) [2008] MLJU 559; [2008] 10 CLJ 486, HC (refd)
PECD Bhd & Anor v Amtrustee Bhd & other appeals [2010] 5 MLJ 357, CA (refd)

Primus (Malaysia) Sdn Bhd v Rin Kei Mei & Ors [2011] MLJU 1586; [2012] 1 CLJ 176, FC (refd)
Sapura Fabrication Sdn Bhd and another matter (GAS, non-party), Re [2024] SGHC 241, HC (refd)
Sunbird Business Services Ltd, Re [2020] EWHC 2860 (Ch), Ch D (refd)
Stichting Shell Pensioenfonds v Krys and another [2014] UKPC 41, PC (refd)
Syed Ibrahim & Co (applying as a legal firm) v Trans Fame Offshore Sdn Bhd (under judicial management) (formerly known as Transfame Sdn Bhd) (BAP Resources Sdn Bhd & Ors, interveners) [2023] 7 MLJ 399, HC (refd)
United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors [2021] 6 MLJ 897, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 176, 176(10)
Companies Act 2016 ss 366, 366(1), (3), (4), 368, 368(1), (1A), (2), (2)(a), (2)(b), (2)(c), (2)(d), (3A), (3B), 369, 369B, 370, 371, 406
Companies' Creditors Arrangement Act 1985 [CA]
Interpretation Acts 1948 and 1967 s 17A

Appeal from: *Sapura Energy Bhd & Ors v Martin Bencher (M) Sdn Bhd* [2024] 9 MLJ 310 (High Court, Kuala Lumpur)

Renu Zechariah (with Aneera Joshini Chowdhury and Lu Ying Suey) (AJ Chowdhury) for the appellant.
Gopal Sreenevasan (with Leong Phaik Leng, Kwong Chiew Ee and Neoh Jin Keat) (Rahmat Lim & Partners) for the respondent.

Mohd Nazlan JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is against the dismissal by the High Court of the appellant creditor's application to be excluded from a proposed scheme of arrangement between the three respondent debtor companies (and 20 other related companies in the group) and their creditors.

[2] The appellant advanced two principal grounds. The first is that the scheme process pursued by the respondents constituted multiplicity of proceedings and was an abuse of process given the existence of an earlier proposed scheme application by the respondents, which also involved applications for restraining orders. Secondly, the appellant's debts fell outside the specified cut-off date for the filing of a proof of debt, on account of a settlement agreement, which post-dated the cut-off date.

[3] Having examined the appeal record and considered the submissions of

parties, we unanimously decided that the appeal was without merit and therefore dismissed the same, for the reasons appearing hereinafter.

KEY BACKGROUND FACTS

The settlement agreement dated 23 February 2022

[4] The appellant, Martin Bencher (M) Sdn Bhd, whose principal business is the provision of shipping and freight services, had instituted two suits for unpaid invoices totalling RM409,242.37 — in Suit No BB-B52–15–10 of 2021 ('Suit 15') filed on 7 October 2021 against the first respondent — Sapura Energy Bhd ('Sapura Energy') and the second respondent — Sapura Fabrication Sdn Bhd ('Sapura Fabrication'), as well as the third respondent — Sapura Offshore Sdn Bhd ('Sapura Offshore') (collectively, the 'three Sapura entities'). As for Suit No BA-22NCVC-482–12 of 2021 ('Suit 482') filed on 7 December 2021, the claim by the appellant was for RM1,140,722.60 against the first and second respondents.

[5] Later however, in pursuance of the exchange of two letters dated 22 February 2022 and a letter dated 23 February 2022 between the solicitors of the parties, the appellant and the respondents agreed to a settlement to consolidate the separate debts owed to the appellant arising from Suit 15 and Suit 482 into a settlement sum of RM223,937.24, USD194,686.55 and EUR102,000 to be paid in seven monthly instalments from February to August 2022.

[6] This settlement agreement of 23 February 2022 contained a condition that upon any default in payment, the full outstanding amount would become immediately payable jointly and severally by the three respondents, being the three Sapura entities. The settlement sum was to be paid in instalments jointly and severally. Thus, the first instalment of EUR102,000 was paid to the appellant, and Suit 15 was withdrawn on 2 March 2022 with liberty to file afresh. However, the three respondents defaulted on the next instalment under the settlement agreement. Suit 482 was therefore stayed instead of withdrawn.

The proposed scheme of arrangement

[7] The Sapura Energy group of companies, *inclusive of* the three respondents ('the Group') operate globally as an integrated energy services and solutions provider. The Group had however been experiencing financial difficulties which the respondents claimed warranted relief from legal proceedings, albeit on temporary basis, which at the same time would proffer the Group the opportunity to formulate a scheme of arrangement with its creditors to restructure the respective applicants' financial affairs and liabilities ('the proposed scheme').

[8] Thus, very soon after the settlement agreement was inked, on 10 March 2022 the three respondents and 20 subsidiaries of the first respondent ('the Group companies') had under ss 366 and 368 of the Companies Act 2016 ('the CA 2016') obtained ex-parte orders in Originating Summons WA-24-NCC-148–03 of 2022 ('OS 148'); firstly, to convene creditor meetings within 12 months and secondly to restrain any actions against the Group companies for three months ('the OS 148 convening and restraining orders'). This restraining order ('the RO') was on 8 June 2022 on the applicants' application to the court, extended by nine months until 10 March 2023.

[9] On 11 March 2022 the appellant was notified by an email from the first respondent of the proposed scheme and the corresponding RO pursuant to OS 148.

[10] The Group companies, in pursuance of the proposed scheme subsequently invited creditors to submit their proofs of debts, with a specification of a cut-off date of 31 January 2022. In response, the appellant filed its proofs of debts on 18 May 2022 to the three respondents in this appeal, being the three Sapura entities, as stated above. Later, on 17 January 2023, the second and third respondents partially rejected the appellant's submitted proofs of debts in OS 148, and no adjudicator review application on the rejection was made. The first respondent however fully admitted the appellant's proof of debt on 24 October 2023 also with regard to OS 148.

[11] Separately, the parties also agreed to a consent order on 27 January 2023 on the appellant's intervention in OS 148 as the appellant claimed that it wanted to ensure that the debt would be accurately reflected in the proposed scheme in accordance with the settlement agreement.

Fresh convening and restraining orders

[12] As the OS 148 convening and restraining orders were expiring on 10 March 2023 and 3 March 2023 (with the RO already having earlier been extended by nine months as stated above), the applicants filed the instant suit WA-24NCC-121–03 of 2023 ('the OS 121') and did succeed in obtaining a fresh ex-parte orders to convene creditor meetings within three months and restraining actions for three months starting 11 March 2023 ('the OS 121 convening and restraining orders'). On 6 June 2023, the OS 121 convening and restraining orders were extended by nine months. This was immediately followed by another, present set of similar orders on the expiry of the OS 121 convening and restraining orders.

Challenge by the appellant to be excluded was dismissed by High Court

[13] On 22 June 2023 the appellant again applied to intervene, this time in the OS 121, seeking exclusion from the proposed scheme or if not, placement in a suitable and separate class. Nevertheless, an order was recorded by consent on 12 September 2023 that leave was granted to the appellant to intervene, without limitation, in respect of the three respondents, and to be at liberty to apply for any further reliefs during the course of the proceedings.

[14] Whilst leave to intervene was agreed by consent, crucially, the appellant had also prayed for other reliefs in its application in encl 139 in relation to the OS 121, key amongst which are first, for the OS 121 convening and restraining orders dated 8 March 2023 and 6 June 2023 and any further orders, to be set aside. Secondly, for the appellant to be excluded from any proposed arrangement and compromise between the applicants and their respective creditors.

[15] The appellant contended that there was multiplicity of proceedings and abuse of process in light of the two ongoing originating summonses, the OS 121 and OS 148, simultaneously. The argument was that if OS 148 was truly spent, it should have been withdrawn. In addition, the appellant asserted that it should not have been included in the proposed scheme in the first place given the criteria set by the applicants, especially on the 31 January 2022 cut-off date for debts when the settlement agreement came into existence subsequently on 23 February 2022.

[16] The respondents' stance was that the OS 148 convening and restraining orders had expired on 10 March 2023 and were thus superseded by the OS 121 convening and restraining orders which became effective on 11 March 2023. There was no duplicity or abuse of process as there were no simultaneous live proceedings. They contended that fresh applications for convening and restraining orders are allowed under the law. Further, the appellant had participated in the proofs of debts exercise in OS 148 and therefore subjected itself to the jurisdiction of the proposed scheme and its adjudication process which carried over to OS 121. This meant that the appellant's status as a creditor and its debt claims must be determined therein and not in any separate legal proceedings.

[17] The High Court dismissed these two key prayers in encl 139 with costs to the Group companies. The learned High Court judge concluded that OS 121 was not an abuse of process and the appellant was subject to the jurisdiction of the proposed scheme in OS 121.

[18] Hence, the instant appeal before us.

Principal grounds of appeal

[19] The appellant largely repeated its main arguments as submitted at the High Court.

[20] The appellant submitted that the High Court was in error when it held that the OS 148 convening and restraining orders — under which the proofs of debts were lodged — had the force of law, when the respondents themselves admitted the said OS 148 convening and restraining orders were no longer effective, and the High Court itself found that with the OS 148 expiring, the applicants obtained fresh orders in OS 121. In other words, it was submitted that the process of the proposed scheme pursued by the Group companies in OS 121 was an abuse given the existence of an earlier proposed scheme application by the same Group companies, in the OS 148 convening and restraining orders, which also involved repeated applications for restraining orders.

[21] The appellant further argued that the High Court was plainly wrong as the appellant claimed to fall outside the applicant's parameters in the proposed scheme. Fundamentally, the cut-off date imposed in the proposed scheme in respect of debts accruing was 31 January 2022. But the appellant's debt came about subsequent to that date since the settlement agreement was dated 23 February 2022, such that the appellant ought not to have been included in the first place, and thus was not subjected to the proposed scheme.

[22] The appellant emphasised that the settlement agreement was the proof of the debt, but despite that, throughout, including during the hearing of the application in encl 139, the respondents denied the existence and relevance of the settlement agreement. The High Court, according to the appellant, could have come to a different conclusion if it had appreciated that the proof of debt that had been made expressly on the basis of the settlement agreement lodged with the first respondent was fully admitted, and not rejected.

ANALYSIS AND FINDINGS OF THIS COURT

Whether the second application under OS 121 and the orders granted pursuant thereto are valid and regular or whether they constituted an abuse of process

Principal provisions on scheme of arrangement

[23] For proper context it is useful that the key requirements pertaining to the law governing scheme of arrangement be mentioned, albeit in summary fashion.

[24] Such a scheme of arrangement is generally understood as a mechanism for a company to achieve the implementation of a formal compromise of its

A debts with all its creditors, usually by restructuring its debts and, if necessary, adjusting the rights of the creditors. Among the most compelling advantages of the statutory scheme in comparison with any negotiations in any proposed compromise with individual creditors requiring unanimity is that a statutory scheme may be approved by a threshold of 75% of the company creditors in B value and, if subsequently endorsed by the court, will be binding on all creditors, including those dissenting.

[25] An integral feature of a scheme of arrangement is the availability of an order to restrain and stop creditors from commencing proceedings to enforce C their debts against the company unless leave from court is obtained. This represents the protection which the law provides to the company to ensure its restructuring efforts are not scuttled pending the approval of a proposed scheme.

D **[26]** The statutory provisions are housed in ss 366 to 371 of the CA 2016. Parliament has recently passed the Companies (Amendment) Act 2024, which came into force on 1 April 2024, However, we do not think these changes are of relevance to this appeal. In any event s 31 of the Companies (Amendment) Act 2024 provides that the new amendments will not apply to any existing E scheme such as the proposed scheme of the Group companies that was commenced before the amended provisions came into force.

[27] Specifically, these unamended provisions read as follows:

F 366 Power of Court to order compromise or arrangement with creditors and members

(1) The Court may order a meeting in a summary way to be summoned in such manner as the Court directs on an application to the Court for the approval of a compromise or arrangement by —

G

(a) a company;

(b) a creditor or class of creditors of a company;

(c) a member or class of members of a company;

H (d) a liquidator, if a company is being wound up; or

(e) a judicial manager, if a company is under judicial management.

(2) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned if the resolution for adjournment is approved by seventy-five per centum of the total value of creditors or class of creditors or the members or class of I members present and voting either in person or by proxy at the meeting.

(2A) All meetings held pursuant to an order of the Court made under subsection (1) shall be chaired by a person who is —

(a) an insolvency practitioner appointed under subsection 367(3); or

(b) a person elected by the majority in value of the creditors or class of creditors or members or class of members, if no insolvency practitioner has been appointed under subsection 367(3).

(3) The compromise or arrangement shall be binding on —

(a) all the creditors or class of creditors;

(b) the members or class of members;

(c) the company; or

(d) the liquidator and contributories, if the company is being wound up,

if the compromise or arrangement is agreed by a majority of seventy-five per centum of the total value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting and has been approved by order of the Court.

(4) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as the Court thinks just.

(5) An order under subsection (3) shall have no effect until an office copy of the order is lodged with the Registrar, and upon being so lodged, the order shall take effect on and from the date of lodgement or such earlier date as the Court may determine and as may be specified in the order.

(6) Subject to subsection (7), a copy of every order made under subsection (3) shall be annexed to every copy of the constitution of the company issued after the order has been made, or in the case of a company not having a constitution, to every copy of the instrument issued constituting or defining the constitution of the company.

(7) The Court may, by order, exempt a company from complying with the requirements of subsection (6) or determine the period during which the company shall comply with the requirements.

(8) If any such compromise or arrangement, whether or not for the purposes of or in connection with a scheme for the reconstruction of any company or the amalgamation of any two or more companies has been proposed, the directors of the company shall-

(a) if a meeting of the members of the company by resolution directs, instruct such accountants or advocates or both as are named in the resolution to report on the proposals and forward their report to the directors as soon as practicable; and

(b) make the report available at the registered office of the company for inspection by the shareholders and creditors of the company at least seven days before the date of any meeting ordered by the Court to be summoned in accordance with subsection (1).

(9) The company and every officer who contravene subsection (6) or (8) commit an offence.

...

368 Power of Court to restrain proceedings

(1) If no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or any member or creditor of the company, restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to any terms as the Court may impose.

(2) The Court may grant a restraining order under subsection (1) to a company for a period of not more than three months and the Court may on the application of the company, extend this period for not more than nine months if —

(a) the Court is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one half in value of all the creditors;

(b) the Court is satisfied that the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members under section 366;

(c) a statement of particulars as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) the Court approves the person nominated by a majority of the creditors in the application by the company under subsection (1) to act as a director or if that person is not already a director, appoints that person to act as a director notwithstanding the provisions of this Act or the constitution of the company.

(3) The person approved or appointed by the Court to act as a director of the company under paragraph (2)(d) shall —

(a) have the right of access to the accounting and other records including registers of the company at all reasonable times; and

(b) be entitled to require from any officer of the company any information and explanation as he may require for the purposes of his duty.

(4) Unless the Court otherwise orders, any disposition of the property of the company including things in action and any acquisition of property by the company, other than in the ordinary course of business, made after the grant of the restraining order by the Court shall be void.

(5) Where an order is made under subsection (1), every company in relation to which the order is made shall, within seven days —

(a) lodge an office copy of the order with the Registrar; and

(b) publish a notice of the order in one widely circulated newspaper in Malaysia in the national language and one widely circulated newspaper in Malaysia in the English language, and the company and every officer who

contravene this section commit an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit and in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(6) An order made by the Court under subsection (1) shall not have the effect of restraining —

(a) further proceedings in any action or proceeding that should be taken against the company by the Registrar or the Securities Commission; or

(b) further proceedings in any action or proceeding against any person including the guarantor of the company but does not include the company that had applied for the restraining order.

(7) If a company disposes or acquires any property other than in the ordinary course of its business, without leave of the Court, the company and every officer who contravene this section commit an offence and shall, on conviction, be liable to imprisonment for a term not less than five years or to a fine not exceeding three million ringgit or to both.

[28] As may be discerned from the above, s 366 of the CA 2016 envisages a three-stage process for the implementation of a scheme of arrangement. Applying it to the present situation, the first is the application to court under s 366(1) by the Group companies for leave to summon the convening of the meeting of the creditors. The second is the holding of the court convened meeting which must approve the proposed scheme by a 75% majority in value of the creditors under s 366(3). The third is the application by the Group companies to the court for the court to sanction the proposed scheme under s 366(4).

[29] The instant case however concerns only the first stage. the proposed scheme has not progressed into the second stage. The court convened meeting pursuant to the OS 148 convening and restraining orders and the OS 121 convening and restraining orders did not/have yet to take place. And critically, it is also at this first stage that an applicant for a scheme may, like the Group companies in the instant case did, apply for (and as stated earlier, did obtain) a restraining order in accordance with s 368 of the CA 2016. Hence, the OS 148 convening and restraining orders and the OS 121 convening and restraining orders.

[30] Now, although this point was neither raised by the parties nor referred to by the High Court in its grounds of judgment we should say that in light of the jurisprudence on the previous law on scheme of arrangement found in s 176 of the Companies Act 1965 ('the CA 1965') (largely retained in the present s 366 of the CA 2016), as well as case authorities from other common law jurisdictions, it is already trite that at the first stage, other than directing the

manner in which the meeting is to be summoned, and ensuring the creditors would be given proper opportunity to be present and to vote, including determining the classification of creditors, the court will not consider the merits and fairness of the scheme.

[31] Significantly, the court will decline leave if the scheme is initiated by an insolvent company as this would be contrary to commercial morality and public policy (see the decision of this court in *PECD Bhd & Anor v Amtrustee Bhd & Other Appeals* [2010] 5 MLJ 357) or when the scheme is bound to fail with no real prospect of success in securing the requisite approval at the court convened meeting.

[32] Crucially for present purposes, leave will also be refused if the application for leave for a court convened meeting at this first stage amount to an abuse of process.

[33] In this regard, the following observation by Abdul Malik Ishak J (as he then was) in *Intrakota Komposit Sdn Bhd v Sogolease Advance (Malaysia) Sdn Bhd* [2004] MLJU 588; [2004] 8 CLJ 276 is most apt and merits reproduction:

> Notwithstanding all these, the courts still retain control of the proceedings because the company is obliged under the law to go back to the courts at every stage of the s 176 exercise (*Re K Rees Emporiums Ltd* [1969] Vic Lexis 156). To summarise, I must say that in a s 176 application the court needs only to be concerned that the statutory provisions of s 176 are complied with and that the court has the inherent power to prevent an abuse of its process and towards this end, the court would decline to invoke its power under s 176 in respect of any proposal which is frivolous, vexatious, embarrassing or is bound to fail in limine. The court will not permit a scheme which is not viable, feasible, workable or intelligible from being put before the creditor because to do so would be a waste of time since the creditor would certainly reject the proposal (*Twenty First Century Oils Sdn Bhd v Bank Of Commerce (M) Bhd & Ors (No 2)* [1993] 2 MLJ 353 at p 355; [1993] 2 CLJ 677 at p 680; *Crystal Establishment Berhad & Ors v Hong Leong Bank Berhad & Ors* [2000] MLJU 157; [2000] CLJU 44; [2000] 1 LNS 44; and *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* [1977] 3 ACLR 69). It is germane to mention that in exercising its discretion under s 176(1) of the Companies Act 1965, the court is entitled to take and may take into account public interest including the question of commercial morality (*Sri Hartamas Development Sdn Bhd v MBf Finance Bhd*).

[34] In this appeal before us, the appellant maintained its position that the Group companies' predominant objective in pursuing the proposed scheme thus far is to secure a restraining order, which we agree is even admitted in their documents. Thus, despite their claim of no duplicity in the OS 148 and OS 121, the Group companies' actions in simultaneously engaging in two court proceedings demonstrated the contrary. In that such concurrent proceedings,

especially when the earlier was left unresolved, constituted an abuse of the court's process. The appellant reiterated that if the OS 148 was genuinely already redundant, OS 148 should have been formally withdrawn.

[35] The learned High Court judge concluded on this point that the filing of OS 121 which resulted in the OS 121 convening and restraining orders was not an abuse of process but a legitimate exercise of any company's rights under the law, aimed at facilitating its financial restructuring and survival.

[36] We agree.

No specific prohibition against consecutive applications and the orders in OS 148 and OS 121 never co-existed

[37] First and foremost, the provisions of s 366 of the CA 2016 do not prohibit consecutive (fresh) applications for convening orders. Based on the words of s 366, there is no restriction which prevents the court from granting a fresh convening order after the earlier one has ceased to have effect after the expiry of the time limit of 12 months imposed by the court when granting leave. We stress that the OS 121 convening and restraining orders is not an extension of the OS 148 convening and restraining orders but in fact and law a fresh set of orders altogether.

[38] Despite how the two were described by the appellant, it is unmistakable, on the facts, that these OS 148 and OS 121 never co-existed at any point in time. The applicants could have initiated the application process for the second convening order whilst the first was still in force, but that was towards ensuring that when the former expired, the latter became immediately effective. It is thus inaccurate to say that OS 148 was left unresolved, because it did in fact and law expire. Neither was it correct to say that OS 148 should have been formally withdrawn, because, to repeat the same thing, it had in fact already expired and ceased to have any legal effect.

[39] As just mentioned, the appellant asserted that the Group companies' main objective in pursuing the proposed scheme thus far has been to secure the restraining order. This is perfectly understandable. For, as stated earlier, usually, although there is no legal necessity to do so, the restraining order under s 368 is often sought at the same time when leave is applied for under s 366 for the obvious reason that efforts towards procuring approval of the scheme by the creditors (or members, as the case may be) and sanction by the court should be protected and not thwarted by any legal suits especially winding up petition and execution process against the company. The same considerations applied in the instant case.

[40] There was no duplicity also because of one other related reason. As was made clear by the Supreme Court in *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 multiplicity involved substantial duplication of reliefs sought in these two suits — the OS 148 and OS 121. But there was no overlap between the OS 148 convening and restraining orders and the OS 121 convening and restraining orders precisely because the earlier OS 148 convening and restraining orders — together with the reliefs that were granted — had expired on 10 March 2023, whilst the subsequent OS 121 convening and restraining orders became immediately effective, the day after on 11 March 2023.

[41] It is essential that the critical nexus between a convening order and a restraining order be appreciated. Section 366 does not stipulate any time limit for the requisite meeting to be convened. That would be a matter falling within the exercise of discretion of the court when giving direction about the holding of the meeting. Thus, in the instant case the court, under OS 148, granted 12 months for the holding of the creditors meeting from the date of 10 March 2022 of the order for leave and direction was given. At the same time a restraining order for three months was also granted. The time limit of three months is stipulated in s 368(1). However, s 368(2) empowers the court to extend the restraining order to a period of not more than nine months from the expiry of the initial three month period, subject however to the fulfilment of certain conditions.

[42] Thus, again in the instant case, the Group companies managed to secure the nine-month extension on 8 June 2022. The net effect is both the convening order and the restraining order — the OS 148 convening and restraining orders — would have a life of 12 months. Only 12 months.

[43] This is because although the 12-month period for the convening order under OS 148 was imposed by the court and could arguably be extended, the life of any accompanying restraining order cannot extend beyond the three plus nine-month time period. Since the Group companies here were unable to present the proposed scheme to their creditors within the 12-month period, and critically, in order to continue to secure the protection from legal proceedings, the Group companies had to initiate a fresh application for leave under the OS 121 to convene the creditors meeting, and thus sought and did secure the requisite restraining order as well, for the same periods of the initial three months and the subsequently extended period of nine months. This was the OS 121 convening and restraining orders.

Restraining order could only be granted if four requirements were satisfied

[44] Furthermore, under s 368(2) of the CA 2016 the court is empowered to grant a restraining order for a period not exceeding three months and an extension thereto for a maximum period of nine months, only if the four requirements set out therein are fulfilled (see the High Court decision in *PECD Berhad & Anor (Part 2)* [2008] MLJU 559; [2008] 10 CLJ 486 which held that these four conditions under the identically worded previous law in s 176(10) of the CA 1965 must be fulfilled in both the initial and extension applications).

[45] These are that first, there must be a proposed scheme between the company and at least 50% in value of the company's creditors; secondly, that the restraining order is necessary to enable the company and its creditors to formalise the proposed scheme; thirdly, that the company must file in court a statement of affairs made up to within three days of the filing of the restraining order application; and fourthly that the court approves the creditor-nominated director being the person nominated by at least 50% in value of the scheme creditors. These are plainly conditions enacted by law to ensure that the proposed scheme is a genuine exercise and serious efforts are afoot to secure the support of the creditors in order to justify the granting of a restraining order, and any extension thereto.

[46] Thus, in the instant case the court must have determined that for both OS 148 and OS 121, the applications for the restraining orders and their respective extensions had satisfied these four requirements. No issue was raised by the appellant here.

[47] All these militate against the finding of any abuse of process on the part of the Group companies, and the respondents in particular.

No extension of restraining order after 12 months

[48] We should state here that we are of the view that s 368 does not empower the court to grant a further extension after the extension of nine months has been granted under s 368(2) of the CA 2016 which states as follows:

> (2) The Court may grant a restraining order under subsection (1) to a company for a period of not more than three months and the Court may on the application of the company, extend this period for not more than nine months if ...

[49] We say so because the language of s 368(2) makes it clear in the words 'extend this period' that the extension for a maximum period of nine months

arises from and relate to the initial earlier period of not more than three months. Also, even if there are successive orders each of which is less than three months, the initial order(s) cannot in aggregate be more than three months. Similarly, even if the extension is not for the entire period of nine months but a succession of shorter periods instead, the total period cannot exceed nine months. As such, each of the OS 148 convening and restraining orders and the subsequent OS 121 convening and restraining orders could not and did not last for more than 12 months.

[50] For completeness on this topic, we should mention that the recent amendments to the CA 2016 did involve s 368(2) and we are of the view that the present law is even clearer in stating that the maximum life of a restraining order is three months plus nine months. We say so for two reasons, both attributed to the language of the amended s 368(2) itself, the entirety of which is set out hereunder:

> 368 Power of Court to restrain proceedings
>
> (1) Where no order has been made or resolution has been passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on an application in a summary way by the company or any member or creditor of the company, grant a restraining order for a period of not more than three months from the date on which the restraining order is granted.
>
> (2) Upon the filing of an application for a restraining order under subsection (1) and until the application is decided by the Court or until the lapse of two months from the date of filing of the application, whichever is earlier-
>
> (a) no order may be made, and no resolution may be passed, for the winding up of the company;
>
> (b) no receiver or receiver and manager may be appointed over any undertaking or property of the company;
>
> (c) no proceedings may be commenced or continued against the company other than the proceedings under section 366, 368C, 368D, 369A or 370 except with the leave of the Court and subject to any terms as the Court may impose;
>
> (d) no execution, distress or other legal process may be commenced, continued or levied against any property of the company except with the leave of the Court and subject to any terms as the Court may impose;
>
> (e) no steps may be taken to enforce any security over any property of the company, or to repossess any goods held by the company under any chattels leasing agreement, hire purchase agreement or retention of title agreement, except with the leave of the Court and subject to any terms as the Court may impose; and

(f) no right of re-entry or forfeiture under any lease in respect of any premises occupied by the company may be enforced except with the leave of the Court and subject to any terms as the Court may impose.

(3) Subject to any terms that the Court may impose, the Court may grant an extension of not more than nine months to the period of restraining order referred to in subsection (1) to a company if —

(a) the Court is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors;

(b) the Court is satisfied that the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members under section 366;

(c) a statement of particulars as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; and

(d) the Court approves the person nominated by a majority of the creditors in the application by the company under subsection (1) to act as a director or if that person is not already a director, appoints that person to act as a director notwithstanding the provisions of this Act or the constitution of the company.

(4) The person approved or appointed by the Court to as a director of the company under paragraph (2)(d) shall —

(a) have the right of access to the accounting and other records including registers of the company at all reasonable times; and

(b) be entitled to require from any officer of the company any information and explanation as he may require for the purposes of his duty.

(5) A restraining order granted under subsection (1) and an extension of the period of restraining order granted under subsection (2) may include one or more of the following orders:

(a) no order may be made, and no resolution may be passed, for the winding up of the company;

(b) no receiver or receiver and manager may be appointed over any undertaking or property of the company;

(c) no proceedings may be commenced or continued against the company other than the proceedings under this section, section 366, 368C, 368D, 369A or 370 except with the leave of the Court and subject to any terms as the Court may impose;

(d) no execution, distress or other legal process may be commenced, continued or levied against any property of the company except with

A the leave of the Court and subject to any terms as the Court may impose;

(e) no steps may be taken to enforce any security over any property of the company, or to repossess any goods held by the company under any chattels leasing agreement, hire purchase agreement or retention of title agreement, except with the leave of the Court and subject to any terms as the Court may impose;

(f) no right of re-entry or forfeiture under any lease in respect of any premises occupied by the company may be enforced except with the leave of the Court and subject to any terms as the Court may impose.

(6) No restraining order under this section shall be granted to a company if an order had been granted to the company under subsection (1), section 368B, 368D or 369C, or its related company under section 368A, as the case may be, within the preceding period of twelve months.

(7) Unless the Court otherwise orders, any disposition of the property of the company including things in action and any acquisition of property by the company, other than in the ordinary course of business, made after the grant of the restraining order by the Court shall be void.

(8) Where an order is made under subsection (1), every company in relation to which the order is made shall, within seven days —

(a) lodge an office copy of the order with the Registrar; and

(b) publish a notice of the order in one widely circulated newspaper in Malaysia in the national language and one widely circulated newspaper in Malaysia in the English language, and the company and every officer who contravene this section commit an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit and in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(9) An order made by the Court under subsection (1) shall not have the effect of restraining —

(a) further proceedings in any action or proceeding that should be taken against the company by the Registrar or the Securities Commission; or

(b) further proceedings in any action or proceeding against any person including the guarantor of the company but does not include the company that had applied for the restraining order.

(10) If a company disposes or acquires any property other than in the ordinary course of its business, without leave of the Court, the company and every officer who contravene this section commit an offence and shall, on conviction, be liable to imprisonment for a term not less than five years or to a fine not exceeding three million ringgit or to both.

[51] The first is the use of the determiner 'an' in the amended s 368(2) which relevant parts now read as follows:

> ... the Court may grant *an* extension of not more than nine months to the period of restraining order *referred to in subsection (1) ...* (Emphasis added.)

[52] This means that there can only be one extension and that period of extension must not exceed nine months. It could be less than nine months, obviously, for example six months, but there cannot be repeated extensions of say, three months after the six months. This is also due to the second reason which is that the extension envisaged must relate back and refer to the initial period of three months since the extension in the provision is given vis a vis the period of the restraining order 'referred to in subsection (1)' which is the three month period.

[53] In other words, the extension under sub-s (2) must relate back and be an addition to the immediately preceding initial three month period. A repeated subsequent extension would not be in adherence to this requirement of s 368(2) because subsequent extension — either less or for argument sake even if more than nine months — would not be an extension to the initial three months, but instead be an extension to a period already extended.

[54] Accordingly we would affirm that the Group companies were correct in taking the view that the restraining order in the OS 148 convening and restraining orders could not be further extended after the 12 month period to provide the protection to the efforts in pursuit of their proposed scheme, which therefore necessitated the filing of the OS 121, which in turn resulted in the OS 121 convening and restraining orders.

Other key changes to provisions on restraining orders

[55] We emphasise however that the recent amendments only came into force in April 2024 and did not apply to the facts examined in this appeal. This is despite the respondents having included the latest and amended version of ss 366 and 368 of the CA 2016 in their bundles of authorities. In any event, none of the parties discussed the issue of repeated extensions of restraining orders in the context of s 368 (pre or post amendments) in their respective submissions.

[56] Still, we consider it germane for us to discuss in summary fashion the recent changes to s 368 that would have affected the restraining orders obtained in the instant case had the law been applicable. In this respect we make three observations.

[57] The first is an entirely new provision in s 368(1A) of the CA 2016 which provides for an automatic restraining order which will take effect upon the filing of an application for a restraining order. This automatic restraining order will be effective for a period of two months or until the application for a restraining order is decided by the court, whichever is earlier. Within the two months of filing, the court will decide whether to grant a restraining order for a period of not more than three months.

[58] The second and more pertinent change is that there is now a clear separation between the initial restraining order for three months (s 368(1)) and the extension of the order for up to another nine months (s 368(2)) in that there is no longer the necessity for the four requirements or conditions under the existing s 368(2)(a) to 368(2)(d) to be satisfied for the initial restraining order. They now clearly apply only in extension applications.

[59] The third is another new provision which is found in s 368(3B) which effectively provides for a clear period or a cooling off period of 12 months before the next restraining order can be granted. It therefore prohibits the granting of a further restraining order if a restraining order has already been granted within the preceding period of 12 months.

[60] At first blush it may be surmised that had this new s 368(3B) been applicable to the instant case, it would have prevented the granting of the restraining order in OS 121 convening and restraining orders because it was granted immediately upon the expiry of the earlier restraining order in OS 148 convening and restraining orders sans a clear or cooling off period of 12 months.

[61] Not so, if the provision is properly examined, as it should be. For clarity, the provision reads as follows:

> (3B) *No restraining order* under this section shall be granted to a company if an order had been granted to the company under subsection (1), section 368B, 368D or 369C, or its related company under section 368A, as the case may be, *within the preceding period of twelve months.* (Emphasis added.)

[62] There shall thus be no restraining order if such an order has been granted within the preceding 12 months. The operative words are — if an order had been granted 'under subsection (1)'. Thus the cooling off period of 12 months is to be measured from the date a restraining order is granted. We reiterate that it refers to a restraining order obtained under sub-s (1). Crucially, it does not refer to any extension granted under sub-s (2).

[63] This is significant. This is because as the cooling off period is triggered from the date of the (initial) granting of a restraining order, it would not apply to prevent repeated restraining orders in the event the said restraining order is extended for nine months, which is certainly not uncommon. In other words, if the restraining order under s 368(1) is given for three months, and immediately extended for the maximum period of nine months under s 368(2), the entire period — which starts from the granting of the restraining order of three months and the subsequent nine months — is already 12 months. During the entire period of that 12 months there is and can be no other fresh restraining order, and this is the cooling off period, despite the fact that the same period is protected due to the existence of a restraining order (in the first three months) which is extended for nine months.

[64] There is nothing in such a scenario to prevent a second filing of a restraining order after the expiry of the nine-month period as by then the 12-month cooling off would expire, just like the case now before us in respect of the filing of OS 121 after the OS 148. There is in such a situation no violation of s 368(3B) of the CA 2016, even though there is no true cooling-off in the sense of a moratorium free period.

[65] However, conversely, if there is no extension such as when an application for one under s 368(2) is refused, no fresh application for restraining order can be entertained on the expiry of the earlier restraining order after three months. As the cooling off period is triggered on the granting of the restraining order which runs for three months, in order to complete the 12-month cooling off period, a fresh restraining order could only be given upon the expiry of the nine months immediately following the said three months.

[66] As such, it seems that the operation of the cooling off period which prevents the filing of a subsequent restraining order is very much dependent on whether a prior extension is granted under s 368(2) of the CA 2016. If there is, the applicant company would continue to be protected from legal proceedings, and a subsequent restraining order may be filed thus further extending an existing order which has already been extended.

[67] If, however there is no extension, a fresh order is only permitted under s 368(3B) after the expiry of the nine months (free of moratorium protection) after the three months of the restraining order. That the law in this context now prohibits a new restraining order when there is no extension of an earlier restraining order is we think perfectly sensible since a refusal of extension means that the applicant company fails to meet the requirements in s 368(2)(a) to (2)(d) of the CA 2016.

[68] Therefore, obtaining a fresh restraining order before the expiry of this nine-month period could potentially be an abuse of process.

[69] Accordingly, having regard to the facts of the instant case, had the new law been applicable, there would have been no infringement of s 368(3B). Even though the court granted a restraining order under OS 121 immediately on the expiry of the earlier restraining order under OS 148 as extended by nine months, by the time the order under OS 121 was granted, 12 months had only just lapsed from the date of the granting of a restraining order under OS 148 convening and restraining orders. If this was permitted under the new law, neither could it be alleged to have been an abuse of process.

[70] On the one hand it is quite plain that the introduction of a specific provision on a cooling-off period is designed to discourage repetitive and repeat filings of applications for restraining orders which would effectively extend the protection period well beyond 12 months. On the other hand, the way the cooling off provision is to be applied shows that the Legislature intended that not every repeat restraining orders cannot be justified, and further promotes the objective of the law on restraining orders and scheme of arrangement which facilitates the protection to the applicant company where its proposed scheme is genuinely deserving of consideration for creditors approval and court sanction.

[71] As such, the court should examine and assess the progress made by the proposed scheme when faced with applications for any second or subsequent restraining orders. Further, and in any event, we emphasise that any application for extension to any restraining order must satisfy the four conditions stipulated in s 368(2)(a) to 368(2)(d).

[72] These four pre-conditions, especially the fourth, present distressed companies with a considerable challenge to secure urgent moratorium protection. As the new law makes them applicable only to the extension of the restraining orders, for all intents and purposes, the applicant companies, like the Group companies in the instant case, will, in order to extend the restraining order likely only have the two-month automatic moratorium period and the three-month initial restraining order to secure sufficient creditors support to satisfy the fourth condition which requires the sanction of the court for the creditor-nominated director after having been nominated by at least 50% in value of the scheme creditors.

[73] The point must also be made that the introduction of the concept of cooling off period in the law on restraining order undoubtedly signifies that

repeated restraining order is not outrightly prohibited, but is clearly consonant with the necessity for continued protection to distressed company in pursuit of deserving schemes.

[74] In fact, even the scope of the moratorium and restraining order has been widened by the new s 368(1A) and 368(3A), further fortifying the purpose of the law to offer distressed companies the avenue to chart their rehabilitation through restructuring. Presently, there can be no resolution passed for winding up, no appointment of a receiver or receiver and manager, and even no steps can be taken to enforce any security when a restraining order is in force.

[75] At the same time, the threat of abuse of court process by having wide-ranging restraining orders is not disregarded given that it can be placed in check via not only the introduction of the cooling off requirement but also adherence to, again, the pre-requisites in s 368(2) of the CA 2016.

Legislative purpose of scheme of arrangement

[76] We agree with the finding of the learned High Court judge that as the provisions of the CA 2016 effective at that time did not explicitly prohibit the filing of consecutive fresh convening and restraining orders (as opposed to repeated extension thereof), ss 366 and 368 ought to be interpreted liberally to facilitate distressed companies to be revived. *Sans* the convening and restraining orders, creditors are free to bring or continue proceedings against the scheme companies to the detriment of the body of the creditors as a whole.

[77] The Court of Appeal of Singapore's decision in *Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal* [2019] SGCA 29 is particularly persuasive, where despite the applicant having gone through three prior restructuring proceedings which had failed, the court ruled that its fourth convening application based on a new scheme did not constitute an abuse of process. Sundaresh Menon CJ, for the court held thus:

> [95] In that light, we consider that there is insufficient evidence in the present circumstances to warrant a finding that Empire Capital's present leave application amounts to an abuse of process. Amongst other things, although this is the Berau Group's fourth set of restructuring proceedings in Singapore (see [15] and [16] above), there have been genuine changes in the restructuring plans put forward in the various applications, ...

[78] The learned High Court judge was also correct in his observations, which accepted the submissions of the respondents, that cases in other common law jurisdictions show that the courts have permitted fresh

application for convening order. This occurred when a previous scheme failed due to a number of reasons. These included inadequate information in the explanatory statement such as in the Hong Kong decision in *Re Century Sun International Ltd* [2022] HKCU 1890; misleading information provided by the applicant in the English case of *Re Sunbird Business Services Ltd* [2020] EWHC 2860 (Ch); and the inability to reach a compromise with scheme creditors resulting in abandonment of a previous scheme, as was in the Australian case of *Lehman Brothers Australia Ltd (No 2)* [2013] FCA 965 [84]–[87].

[79] In *Century Services Inc v Canada (Attorney General)* [2010] 3 SCR 379, which involved a debtor company commencing proceedings under the Companies' Creditors Arrangement Act RSC 1985, c C-36 ('the CCAA') to obtain a stay of proceedings to allow it time to reorganise its financial affairs, the Supreme Court of Canada observed that the purpose of the CCAA is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets as liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees.

[80] Relevantly in this regard, the Supreme Court of Canada also held that the scope of a court's discretion when supervising reorganisation must be given an appropriately purposive and liberal interpretation having regard to the remedial nature of the CCAA and insolvency legislation generally.

[81] In a decision of the Supreme Court of British Columbia in *Hawkair Aviation Services Ltd, Re* [2006] BCJ No 938, in the context of the analysis on the purpose of the same restructuring legislation — the CCCA, it was held as follows:

> 14 The purpose of maintaining the status quo existing at the time of the filing is so that the proceedings under the Act can produce a plan of reorganization which will benefit the company, its creditors, and, potentially, the community in which the Company operates. In this case, the Company has 98 employees in Terrace, Vancouver, Prince Rupert, Fort St John, and Dawson Creek.
>
> ...
>
> 16 In *Re Lehndorff General Partner Ltd* (1993), 17 CBR (3d) 24 (Ont GD) Farley J stated:
>
> > *The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation.* It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their

creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors (at para 5).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both ... (Emphasis added.)

[82] Our courts too are similarly unequivocal in expressing the same overriding objective of the laws on scheme of arrangement as enacted in companies legislation such as in the repealed s 176 of the CA 1965, now contained in ss 366 and 368 of the CA 2016.

[83] In *Intrakota Komposit*, the court observed in no uncertain terms:

This type of arrangement would float a flagging company heavily burdened with debt to survive provided that there is a possibility that the business may be viable ... s 176 of the Companies Act 1965 is designed to save a company in difficulty and it is the best alternative to liquidation. As far as the company is concerned, s 176 of the Companies Act 1965 is a life saving device designed by the legislators and it will be resorted to, from time to time.

[84] The Federal Court in *Primus (Malaysia) Sdn Bhd v Rin Kei Mei & Ors* [2011] MLJU 1586; [2012] 1 CLJ 176 stated as follows:

[43] From our understanding, a scheme of arrangement falling within the contemplation of s 176 of the Act is basically a scheme under which the rights of creditors and/or members are varied for the benefit of both the company and its creditors/members. The term 'scheme of arrangement' is used where there is an internal arrangement within the company and does not involve any other company. The common use of such a scheme is the restructuring of the financial affairs of a company heavily burdened with debt. Section 176 is usually resorted to when the company is insolvent but there is some possibility of avoiding liquidation. Such a scheme may be able to save viable businesses resulting ultimately in a benefit to the creditors. Through such schemes, the company may be able to reach a compromise with creditors where the creditors agree to accept less than the amounts owed to them.

[44] Further, s 176 allows a corporate restructuring to proceed under the court's supervision where the decisions of the majority creditors are binding on the minority creditors. The provision provides a mechanism to facilitate a formal compromise which binds dissenting participants so long as the agreement by statutory majority, defined as at least 75% in value and 50% in number of creditors, has been achieved, and subject to the approval of the court. This helps to overcome the impossibility or impracticability of obtaining unanimous consent of all the

creditors to implement a debt-restructuring scheme. Thus, in cases where restructuring is not the desired objective, creditors can choose to wind up the distressed company.

[85] We also do not disagree with the High Court when, having regard to the laws governing judicial management order, by analogy, highlighted the case of *Syed Ibrahim & Co (applying as a legal firm) v Trans Fame Offshore Sdn Bhd (under judicial management) (formerly known as Transfame Sdn Bhd) (BAP Resources Sdn Bhd & Ors, interveners)* [2023] 7 MLJ 399 which ruled that nothing prevents the court from granting a fresh judicial management order after the previous judicial management order has expired under s 406 of the CA 2016.

[86] We are therefore inclined to agree with the view that to forbid repeated applications in the form of the OS 121 convening and restraining orders by the applicants under the law then in force despite the possible evolvement and dynamism of the proposed scheme in the instant case would effectively shut the door to the Group companies and the respondents who are continuing to strive to restructure beyond the maximum 12-month period. This bleak outcome, we must add, is certainly antithetical to the very purpose of the scheme provisions which, we stress, are designed to save distressed companies.

[87] Sections 366 and 368 of the CA 2016 must therefore be interpreted liberally to give effect to this objective of saving companies and preventing an objecting minority from frustrating the scheme. Adopting a purposive approach, which is also mandated by s 17A of the Interpretation Acts 1948 and 1967 which requires the resultant interpretation of a statutory provision such as ss 366 and 368 of the CA 2016 ought to be one that would promote the purpose or object of the legislation, we have no hesitation in stating that given the overarching intent of the Legislature, which in this context leans towards ensuring the survival of financially distressed company whilst also safeguarding creditors' interests, restricting applications beyond the 12-month period prescribed in s 368(2) in force then would contradict the intent of the Legislature.

[88] This also means that the expiry of OS 148 convening and restraining orders ought not to be the end of the matter for the Group companies and the respondents, since a reassessment based on new circumstances and requirements could justifiably result in the necessity to file a fresh application for convening creditors meeting and restraining order, with the further likelihood of an extension of the restraining order, all subject to adherence to the four conditions in s 368(2)(a) to (d).

[89] This was what that had exactly transpired when the court granted the OS 121 convening and restraining orders. After all it is worthy of emphasis that ss 366 and 368 as applied to the present case contained no prohibition against consecutive applications for convening and restraining orders (although the present law after the recent amendments has introduced the cooling off provision, albeit further reinforcing the purpose of the legislation, as discussed above), provided each application is justified and meets the statutory requirements.

[90] It cannot be emphasised enough that the requirements in s 368(2) are there to ensure that creditors of the scheme company are aware of the company's intention to apply for a restraining order by requiring the company to inform creditors holding more than 50% in value of debt owed by the company of its intention to implement a scheme of arrangement. The company is also compelled to secure the support of these creditors on the person whom the company intends to retain in management throughout the duration of the restraining order. Without the backing of these creditors, the scheme may not receive the sufficient support required for the scheme to be approved in a meeting of creditors. At the same time, to begin with, the company may not even reach the stage of convening the creditors meeting to consider the proposed scheme without the moratorium or stand-still offered by a restraining order.

A case of abuse involving multiple applications for restraining orders distinguished

[91] The appellant did not refer to any authorities on abuse of process to support its submission before us. We noted that at the court below the appellant did refer to the decision of this court in the case of *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637; [1999] 4 CLJ 533. But that case does not involve any scheme of arrangement, much less any restraining order. Gopal Sri Ram JCA (as he then was) did however in that case enunciate the important general rule on abuse of process in that whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances, and that since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are not closed.

[92] In such a context, steps taken by the Group companies and the respondents in this case — particularly in filing OS 121 did not in our view amount to an abuse of process. It cannot be said that the process was abused or that it was diverted from its true objective of pursuing the enforcement of just claims so as to instead accomplish an improper outcome.

[93] Far from it. Instead, it is, as shown above, not prohibited by the statutory provision (even under the present amended law in s 368 of the CA 2016), is not inconsistent with the overall purpose of the statutory provisions to assist in the survival of distressed companies and their creditors, and is similarly countenanced in other common law jurisdictions.

[94] A far more comparable case is *Dynawell Corporation (M) Sdn Bhd (in provisional liquidation) v Universal Trustee (M) Berhad* [2013] 1 LNS 1391 where the High Court held that the filings of various restraining orders was done mala fide and an abuse of process.

[95] However, it must be stated that the facts in the instant case are distinguishable from those in that decision. In that case, it was discovered that during proceedings against the company there had been at least six different applications for restraining order in courts in Kuala Lumpur, Shah Alam, Seremban and Taiping, although the court found that the cause papers for all of them originated from the same source.

[96] These restraining orders delayed foreclosure and the winding up proceedings against the company such that the creditors in opposition had to apply to these different courts to have the orders set aside. Other than the court making the finding these orders have been filed mala fide, there were also directions given that any further applications for a restraining order could only be made inter partes and for such an application to be advertised in three different newspapers.

[97] It is clear from these facts that the restraining orders in *Dynawell* had been filed on parallel and multiple basis, making it difficult for the opposing creditors to seek to have them set aside, as well as delaying various proceedings already being pursued by creditors against the company. In sharp contrast, in the instant case, the subsequent restraining order in OS 121 convening and restraining orders was obtained to further extend the protection offered earlier in OS 148 so that work towards the presentation of the proposed scheme at the creditors meeting for their approval could continue to be pursued. There were no parallel or concurrent restraining orders here. There is no abuse of process.

[98] We therefore are in agreement with the conclusion of the learned High Court judge that the fresh application by the applicants under OS 121 adheres to the spirit of the legislation, which is aimed at providing companies with an opportunity to revive and restructure in the face of financial distress. We further find no errors in the conclusion held by the learned High Court judge on this issue, as follows:

[27] In conclusion, this court finds that the applicants, have made a bona fide application under OS 121 for fresh convening and restraining orders, in line with the provisions of the Companies Act 2016 and supported by judicial precedents and legislative intent. The application is not an abuse of process but a legitimate exercise of the company's rights under the law, aimed at facilitating its financial restructuring and survival. Therefore, Martin Bencher's ground to set aside the OS 121 convening and restraining orders or to be excluded from the scheme premised on the purported abuse of process is rejected.

Whether by reason of the settlement agreement, the appellant's debt fell outside the cut-off date for the filing of proofs of debts

Whether consideration of PODs by respondents was on the basis of the settlement agreement

[99] This is the other key ground of appeal raised by the appellant. In essence, it argued that the debt owing to the appellant was after the cut-off date of 31 January 2022 such that the appellant ought not to be included as a scheme creditor. This, according to the appellant was the case because the appellant submitted its proofs of debts based on the settlement agreement which was in fact entered into after the cut-off date. The appellant had also filed an intervener application (consented to by the respondents) also on the basis of the settlement agreement with a view to ensuring that the respondents adhere to the proper processes in the reflection of the nature of the debt owed to the appellant in that it was consolidated and owed jointly and severally by the three Sapura entities, as well as that the appellant be placed in a correct and suitable class of creditor.

[100] However, in January 2023, the appellant's proofs of debts ('the PODs') made on the express basis of the settlement agreement in respect of the second and third respondents were rejected, which rejection was taken by the appellant to mean that the respondents were reneging on the settlement agreement, which in any event fell outside the cut-off. This led to another application by the appellant seeking its exclusion from the proposed scheme or it be placed in a separate, suitable and proper class of creditors or in any proposed arrangement and compromise of the respondents that would accurately reflect the debt owed to it. This was dismissed by the High Court, and hence the appeal now before us.

[101] After the dismissal by the High Court, the appellant was informed that the first respondent had accepted the appellant's POD which it claimed made on the basis of the settlement agreement. This was admitted into evidence. The High Court may have therefore come to a different conclusion if it had

cognisance that the POD made expressly on the basis of the settlement agreement lodged with respect to the first respondent had been accepted, and not rejected.

[102] It is common ground that the appellant in OS 148 had submitted proofs of debts to the three respondents under the proposed scheme. The amounts under the three PODs to the respective three respondents were the same. The appellant as a scheme creditor in OS 148 had submitted PODs to the three Sapura entities on 18 May 2022. On 17 January 2023, the second and third respondents issued notices of partial admission of the PODs to the appellant which set out the admitted and rejected portions of the appellant's claims.

[103] More specifically in the second respondent's notice dated 17 January 2023, it was stated that the admitted claim against it was for an amount of RM823,669.66, equivalent to RM194,611.64 and USD150,061.55, while the rejected claim amounted to RM216,393, the equivalent of RM29,325.60 and USD44,625. As for the notice from the third respondent, also dated 17 January 2023, the admitted claim amounted to RM216,393.60, equivalent to USD44,625 and RM29,325.60; whilst the rejected claim was RM823,669.66, equivalent to USD150,061.55 and RM194,611.64.

[104] However, as for the scheme for the first respondent, the scheme chairman had admitted the entirety of the appellant's claim, in the amount of RM1,040,063.26 (equivalent to RM223,937.24 and USD194,686.55 at the conversion date of USD1 = RM4.192 at closing rate on 31 January 2022).

[105] The High Court found that the settlement agreement to be irrelevant as the appellant had lodged the PODs in OS 148, and therefore could not be excluded from the scheme.

[106] The appellant insisted that it fell outside the parameters of the proposed scheme since the cut-off date for the accrued debts was 31 January 2022, yet its debt as evidenced in the settlement agreement was dated 23 February 2022. The settlement agreement was the very proof of the debt. As such, the appellant ought never to have been included in the first place.

[107] We do not find merit in this line of argument. We are of the view that the High Court had correctly analysed this issue in the following paragraphs from the grounds of judgment:

> [31] As a starting point to this analysis, it is important to consider the basis Martin Bencher filed its PODs in the earlier OS 148. These were filed on 18 May 2022 with

the understanding that it was claiming for debts that had arisen prior to 31 January 2022, the cut-off date that was stipulated in the OS 148 proposed scheme.

[32] However, Martin Bencher's argument is that the PODs were based on a debt that it is claiming against Sapura Energy, Sapura Fabrication and Sapura Offshore based on a consolidated and crystalised sum under the settlement agreement acknowledging their earlier debts. *This argument cannot be sustained. This is because the proof of debt process in OS 148 did not allow for debts arising after 31 January 2022 to be claimed. Martin Bencher could not have been claiming for a debt based on the settlement agreement which was executed on 23 February 2022 after the cut-off date of 31 January 2022. The claim could only have been based on debts arising earlier*.

...

[39] Martin Bencher argues that the settlement agreement is not merely a revised payment schedule of the debts of Sapura Energy, Sapura Fabrication and Sapura Offshore but is actually an agreement between Martin Bencher and Sapura Energy, Sapura Fabrication and Sapura Offshore which has legal force. *However, the court does not find this to be relevant given that Martin Bencher had already submitted PODs for debts accruing before the cut-off date, thereby establishing themselves as scheme creditors and subjecting themselves to the scheme's jurisdiction in OS 148*. The Industrial Court case of *Ooi Wooi Song v LCI Global Sdn Bhd* [2020] ILJU 74; [2020] ILRU 0285; [2020] 2 ILR 0285, demonstrates that a creditor who submits a proof of debt to the company constructs a legal relationship with the company to be governed by an approved scheme of arrangement, binding that creditor to the scheme. In this case, the Industrial Court held that when the claimant filed a proof of debt to the company, via the Insolvency Department, he submitted to the jurisdiction of the sanctioned scheme and was therefore bound by its terms, unable to pursue separate legal remedies for non-compliance outside the scheme. I accept this to be the correct position in law. (Emphasis added.)

[108] We do not appreciate how this reasoning of the High Court could be faulted. The crux of the appellant's contention is that the settlement agreement came into existence subsequent to the cut-off date on debt already incurred by the said date. Since the settlement agreement was executed post the cut-off date, it could not, quite simply and logically, be classified as a debt already existing and owing by the three respondents to the appellant at the cut-off date. The appellant should as such be taken out of the proposed scheme.

[109] That much is not inaccurate but the appellant had misconceived the facts before us. The three Sapura entities did not recognise the settlement agreement. But they had examined the PODs filed by the appellant on the basis of the debts already subsisting and owing to the appellants prior to the same being made subject to the arrangement set out in the settlement agreement. It cannot be denied that the debts were already in existence before the entry of the settlement agreement.

[110] At the risk of repetition, as mentioned much earlier, the settlement agreement came about from the consolidation of the debts owed to the appellant by the three Sapura entities, for which two separate suits had been instituted. One was for unpaid invoices totalling RM409,242.37 in Suit 15 against the three respondents, or the three Sapura entities. The other was Suit 482 in respect of the claim by the appellant for RM1,140,722.60 against the first and second respondents. These two suits were filed on 7 October 2021 and 7 December 2021 respectively. The settlement agreement was dated 23 February 2022 whilst the cut-off date for submission of a proof of debt for the proposed scheme was 31 January 2022. The settlement agreement which was executed subsequent to the cut-off date could not therefore have been considered. It was not considered. Instead the debts which had already been incurred and owing to the appellant prior to the cut-off date as evidenced from the Suits 15 and 482 (and prior to the entry of the settlement agreement) were taken into account.

[111] And pertinently, despite now asking to be excluded from the proposed scheme, it was also the appellant who had voluntarily made the submission of the PODs for the proposed scheme in the first place.

[112] As such, whilst the appellant contended that its proofs of debts were based on the settlement agreement, the High Court had correctly described the PODs as having been submitted with the understanding that they were claiming for debts that had arisen prior to the cut-off date of 31 January 2022.

[113] Thus, in the case of the PODs filed against the first respondent which had been wholly admitted, it did not mean that the first respondent had given recognition to the settlement agreement. Instead it simply meant that the entire amount so claimed against it had indeed accrued as at the cut-off date. In any event, neither could the appellant show clear evidence that the three respondents or the three Sapura entities had accepted that the PODs filed by the appellant were assessed on the basis of the binding existence of the settlement agreement. The relevant letters to the appellant from the respective respondents dated 17 January 2023 and 24 October 2023 on the admission and rejection of the PODs did not say that their decisions on the PODs were on the basis of the debts as represented in the settlement agreement.

[114] It should further be highlighted that the notices from the respondents to those having claims against the companies had also set out instructions for the adjudication process for rejected claims, including the appointment of an independent adjudicator and the process for submitting an application for review.

[115] However, as mentioned much earlier, the appellant chose not to avail itself to the review process. We find that the High Court had correctly determined that the respondents' subsequent notification to the appellant that it had effectively waived its right to dispute the rejection meant that the appellant remained a creditor in the scheme in OS 148 (and carried over in immediately successive proceedings, as discussed further, below).

Submission to jurisdiction of the scheme by the filing of the proofs of debts

[116] It bears emphasis that by filing its PODs (in this case, for the same amount the appellant alleged it was entitled to under the settlement agreement) as debts that had arisen prior to the cut-off date of 31 January 2022, the appellant had unmistakably voluntarily elected to make the submission of the POD, and established itself as a scheme creditor. This resulted in the appellant submitting to a legal relationship between itself as creditor and the respective scheme company agreeing for the debts to be determined under the proposed scheme.

[117] It cannot be emphasised enough that it was the appellant's own conduct that had submitted its PODs on 18 May 2022. This, we agree amounted to a submission to the scheme process supervised by the court. This legal position is already well-established in the context of company liquidation.

[118] In Australia, in the case of *Harris (in their capacity as joint and several liquidatrs of Samgris Resources Pty Ltd) (In Liq) v Samgris Resources Pty Ltd (In Liq)* [2022] QSC 126, it was held by the Supreme Court of Queensland that having submitted a proof of debt, the party having done so was bound by the liquidators' decision to reject it, subject to that party's right under the applicable statute to appeal against the rejection.

[119] In a Privy Council decision in *Stichting Shell Pensioenfonds v Krys and another* [2014] UKPC 41, which concerned an appeal from the decision of the Court of Appeal of the British Virgin Islands, observations to the same effect can be found in the following self-explanatory passages from the judgment written by Lord Sumption and Lord Toulson:

> 31. ... The question here is not what remedy is Shell entitled to have, but whether it has submitted to the jurisdiction of the court. A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the defendant lodged a proof. It cannot make any difference to the character of that act whether the proof is subsequently admitted or a dividend paid, any more than it makes a difference to the submission implicit in

beginning an ordinary action whether it ultimately succeeds. This result is neither unjust nor contrary to principle, for by submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its merits and satisfied according to the rules of distribution if it is admitted. *The Board would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside the liquidation on claim B. But what he may not do is take any step outside the liquidation which will get him direct access to the insolvent's assets in priority to other creditors. This is because by proving for claim A, he has submitted to a statutory scheme for the distribution of those assets pari passu in satisfaction of his claim and those of other claimants.*

...

32. ... Liquidation is a mode of collective enforcement of claims arising under the general law. There is, in the present context, no relevant difference between the claim for which Shell proved (a debt arising from its redemption notice) and the claim for which it did not prove but which it has put forward in the Dutch proceedings (damages for misrepresentation and breach of warranty). They both arise under the general law. They are both capable of being proved in the liquidation. If they are proved, the BVI courts will have subject-matter jurisdiction to adjudicate on them. *And so far as they submitted by proving for anything in the liquidation, Shell submitted to a statutory regime which precluded it from acting so as to prevent the assets subject to the statutory trust from being distributed in accordance with it*. (Emphasis added.)

[120] And as submitted by the respondents, in our jurisdiction, in the case of *United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors* [2021] 6 MLJ 897, which concerned a stay proceedings in a situation where Malaysia was argued not to be the proper forum for the dispute, this court referred to the filing of a proof of debt as constituting submission to jurisdiction, as follows:

[46] *Rubin and another v Eurofinance SA and others; New Cap Reinsurance Corporation Ltd (in liquidation) and another v Grant and others (as members of Lloyd's syndicate 991 for the 1997 year of account) and another* [2013] 1 All ER 521 referred to by USSB was an instance where *proof of debt, participation in creditors meeting and receipt of dividends were held to be submission to jurisdiction. Quite apart from it concerning internal insolvency proceedings* as opposed to civil proceedings in the form of the USSB suit and the Singapore suit, there was never any proof of debt filed by UOB in the winding up proceedings. (Emphasis added.)

[121] As such, it may be stated that as a general rule the act of the filing of a proof of debt to the insolvency administration in a liquidation context would tantamount to the creditor submitting to the jurisdiction of the court governing the applicable process, which as a corollary also means that the court

supervising the administration has the requisite authority and powers to make orders relevant to and vis a vis the administration, as against the creditor who has so proved.

[122] In our view, although these authorities relate to the submission of a proof of debt in company liquidation, such submission to jurisdiction would similarly obtain in the context of the filing of a proof of debt in respect of a company pursuing a scheme of arrangement.

[123] Other than the finding to such effect made by the court below (with respect to this case before us), the High Court of the Republic of Singapore had the occasion to pronounce on this matter, coincidentally in a suit which also concerned the proposed scheme of the three Sapura entities.

[124] In the case of *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)* [2024] SGHC 241, the High Court decided to allow the carve-out from the protection enjoyed by Sapura Fabrication and Sapura Offshore (the second and third respondents before us), as prayed for by GAS, thus permitting GAS to proceed with its arbitration action against the two respondents, but on a condition that no enforcement action would be taken by GAS in respect of any award it might obtain from the arbitration, in Singapore or elsewhere.

The submission to jurisdiction continues and survives in the immediately succeeding fresh proceedings, being part of a single and continuous endeavour by scheme companies

[125] Significantly, the Singapore High Court also accepted the stance of the respondents there, which had relied on the decision of this case (presently before us) at the High Court, that the submission to jurisdiction persisted throughout the rest of the succeeding proceedings, whereby on the facts of the proceedings vis a vis the proposed scheme taken thus far in the instant case, the PODs filed in the first proceeding (the OS 148) constituted a submission to the jurisdiction in the subsequent proceedings (the OS 121 and immediately thereafter, the one subsequent to it). In other words, the submission of the PODs in respect of the first proceeding later amounted to the submission to the jurisdiction in the second, and subsequently the third, in immediate succession.

[126] The High Court of Singapore in *Re Sapura Fabrication* further held that the submission to the courts' jurisdiction in respect of the proposed scheme might have lapsed with the termination of the first proceeding (the OS 148) if a fresh proof of debt exercise had to be instituted in respect of the second and any subsequent proceedings. Which was not the case here. The following passages from the judgment of the High Court are pertinent:

80. ... Given that the second and third reorganisation proceedings did not seem to have required a fresh proof of debt exercise at large for all creditors, the import of the Malaysian High Court's decision in *Martin Bencher* was that the second and third reorganisation proceedings were, in substance, extensions of time to complete the proof of debt exercise commenced during the first reorganisation proceeding, albeit taking the procedural form of separate filings due to a lack of a power for continuous extensions to be granted to extend the first reorganisation proceeding. *But for that characteristic of the Malaysian scheme of arrangement, there would have been no doubt that the first reorganisation proceeding would have extended to-date. In my view, there is thus an air of unreality in GAS's submission that the three reorganisation proceedings should be viewed as completely distinct proceedings. Such an approach, with respect, places far too much focus on the form rather than the substance.*

81. This conclusion is reinforced by the *Giant Light Metal* case relied on by the Sapura Entities. In that case, Andrew Ang J identified a principle of 'inchoate submission' where (at [48]):

> ... the courts are willing to recognise, for the purposes of international jurisdiction, that a party's consent to the jurisdiction of a foreign court in relation to certain claims may be imputed to further claims in some circumstances. ... Such 'inchoate submission' ... is also possible in relation to claims which are brought pursuant to subsequent and separate proceedings in respect of the same parties, rather than just to claims which are part of the same proceedings.

The learned judge also observed that, in determining if a submission to one proceeding should be imputed to another, the court's assessment '[would] be informed by concerns of fairness to both the plaintiff and the defendant, and also a desire to disregard technical impediments created by procedural rules under both foreign and forum law' (Emphasis added.): see *Giant Light Metal* at [49].

82. In my view, the present case falls squarely within the rationale articulated by Ang J since, as mentioned at [80] above, *the need for separate reorganisation proceedings has been because of Malaysian law requiring a fresh filing to be made every 12 months. The separate filings are part of a single and continuous restructuring effort by the Sapura Entities, such that a creditor either submits to the restructuring or he does not; he does not submit for the initial leg, but not to the subsequent legs, of the restructuring.*

83. For this reason, I agree with the Sapura Entities that *it is sensible for the Singapore courts to look to the substance of the matter and find that GAS's submission to the first reorganisation proceeding also amounted to a submission to the subsequent reorganisation proceedings, including the ongoing third reorganisation proceeding*. (Emphasis added.)

[127] We are of the view that the analysis by the High Court of Singapore on this issue, which is generally consistent with the findings of the court below us at first instance, on not only the position of the submission to jurisdiction by virtue of the filing of a proof of debt in a scheme of arrangement but also the status of such filing in succeeding proceedings, to be accurate. It does no violence to the language of the relevant provisions of the CA 2016, and promotes the purposive interpretation of these provisions, as discussed earlier.

[128] This therefore entirely puts paid to the appellant's assertion that the respondents here were taking an inconsistent position in that the latter had to secure fresh orders in the second proceedings (the OS 121), but yet at the same time had carried over the PODs from the earlier proceedings in OS 148.

[129] We say so because the point is simply that the law takes cognisance of the fact that once there is a voluntary submission to jurisdiction by the filing of a proof of debt in one proceeding in a proposed scheme of arrangement, such submission would continue and survive in any immediately succeeding proceedings, such as in the OS 121 and the one after it, which is currently in place, because these proceedings are part of a single and continuous restructuring effort by the respondents.

[130] In other words, in this case, the voluntary submission of the PODs by the appellant in the first scheme proceedings did not only tantamount to a submission to the jurisdiction of the OS 148, but also a submission to the jurisdiction concerning the second proceedings (the OS 121) which became effective immediately upon expiry of OS 148 convening and restraining orders, and then the continued submission to the jurisdiction vis a vis the present third proceedings which in turn had taken effect on 11 March 2024 immediately on the expiry of the second, in OS 121 convening and restraining orders on 10 March 2024.

[131] Furthermore, and in any event, we also hold that the carrying over of the PODs process in immediately successive proceedings would not constitute an abuse of process because of one other reason. Which is this. During the relevant period, which was prior to the most recent amendments to the CA 2016 concerning scheme of arrangement in 2024, the governing legislation did not provide for a set procedures for the ascertainment of the claims of scheme creditors. The statute then lacked provisions regulating the admission or rejection of creditors' claims made by way of any proof of debt for purposes of voting or for distribution of payments under a compromise or arrangement.

[132] Companies undergoing a scheme of arrangement could therefore formulate their own proof of debt process they deemed suitable. This would have included adopting the proofs of debts that had been admitted in the earlier scheme proceedings in the immediately succeeding proceedings. As we have stated earlier, there was no multiplicity when the respondents filed the second proceedings in OS 121 while the first in OS 148 was still in force since the former only became effective immediately on the expiry of the latter. The High Court usefully explained the position in the following terms:

> [46] However, it is noteworthy that the applicants have incorporated the OS 148 orders into the OS 121 convening and restraining orders. In Annexure A of the order dated 8 March 2023, in paras 12 and 13, it is stipulated that the Chairman is

responsible for determining the amounts owed to each scheme creditor for voting purposes at the court-convened meetings (para 12). For this purpose, the Chairman can consider the results of the proof of debts exercise conducted in OS 148, including admissions, rejections, and any modifications made by the adjudicator in OS 148 (para 13), giving the orders in OS 148 a renewed legal effect. Paragraph 12 reads:

> 12. The Chairman shall determine the amounts due to each Scheme Creditor for voting purposes at the Court-Convened Meetings.
>
> 13. For the purpose of such determination, the Chairman is entitled to rely on the outcome of the proof of debts exercise conducted in the OS No. WA-24NCC-148–03/2022, including any admission or rejection of the proof of debts by the Chairman in the said exercise and any variation to his decision by the Adjudicator in OS No WA-24NCC-148–03/2022.

[133] For completeness, we should add that following the amendments to the CA 2016 by way of the Companies (Amendment) Act 2024 which came into force on 1 April 2024, the new s 369B introduces a statutory framework for establishing the status of a person as a creditor for voting purposes at a court-convened meeting, provides certainty on matters in respect of the adjudication of the proof, such as the manner and period for filing a proof of debt, adjudication by the meeting's chair, inspection of other creditors' proof of debt, and challenges against the chair's decision concerning a proof filed by a creditor.

[134] And on the same date of 1 April 2024, the Companies Commission of Malaysia had also issued the guidelines for the adjudication of proof of debts under s 369B of the Companies Act 2016, which were intended to provide clear procedures for adjudicating proof of debt under the new s 369B.

CONCLUSION

[135] In light of the above analysis and reasons, we find no errors in the judgment of the High Court dismissing the application of the appellant to be excluded from the proposed scheme.

[136] We conclude that in particular, the OS 121 convening and restraining orders which became immediately effective on the expiry of the OS 148 convening and restraining orders (and the order succeeding the former thereafter) did not tantamount to multiplicity of proceedings or an abuse of process. By the appellant filing its proofs of debts during the period under the OS 148 convening and restraining orders, which was considered by the respondents on the basis of the debts already incurred before the relevant cut-off date, the appellant had voluntarily submitted to the jurisdiction of the proposed scheme, which submission continues and survives in the proceedings

which consecutively immediately succeeded the expiry of the OS 148 convening and restraining orders.

[137] As such, the order of the High Court dated 16 October 2023 is affirmed, and this appeal is dismissed, with cost to the respondents.

High Court's order affirmed; appeal dismissed with cost to respondents.

Reported by Dzulqarnain Ab Fatar